BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

OFFICE OF ZONING
DISTRICT OF COLUMBIA
'00 JAN 27 P4:44

Re: **Appeal of George R. Clark, Esq. and Mary Clark, Stuart Sloame and Mary Seeherman, James D. and Emily Baker**

BZA Appeal No. 16533
Public Hearing: 2/2/2000
ANC 3F

OPPOSITION STATEMENT OF INTERVENOR, FOREST HILLS, LLC

Forest Hills, LLC (the "Intervenor") is the owner of 4512 28th Street, N.W. (Square 2251, Lot 29)(the "Property"). By letter to the Board of Zoning Adjustment ("Board" or "BZA") dated November 16, 1999, Forest Hills, LLC, through undersigned counsel, requested to intervene as a party in this appeal filed by George R. Clark, Esquire[1] and Mary Clark, Stuart Sloame and Ellen Seeherman, and James D. Baker and Emily Baker (collectively, the "Appellants"). The Appeal, as filed on November 3, 1999, raises a limited set of issues involving a June 7, 1999 building permit and September 17, 1999 permit revising the original permit, including: a) improper application of the thee-story height limitation; b) construction not an extension or addition to an existing building; c) no wall check showing compliance with the side yard restrictions; d) incorrect issuance of permits and construction not in accordance with permits; and e) extension of an existing side yard beyond original structure.

BZA
Case No. 16533
Exhibit No. 34

[1] Mr. Clark has acted as "Attorney for Appellants."

Board of Zoning Adjustment
District of Columbia
CASE NO.16533
EXHIBIT NO.34

Intervenor, through undersigned counsel, submits the following opposition to this appeal and respectfully requests that the Board deny the appeal as without merit, untimely, and legally barred.

I. SUMMARY OF OPPOSITION

As set forth in detail by Intervenor, the following conclusions are inescapable:

1. This appeal was untimely and must be dismissed because the Board of Zoning Adjustment lacks jurisdiction.

2. This appeal is barred by the legal doctrine of laches and must be dismissed.

3. Appellants' opposition to this project is based on their personal and subjective standards which, although very real to them, are not relevant to this appeal and the enforcement of the Zoning Regulations by the Department of Consumer and Regulatory Affairs ("DCRA") and the Board.

4. Intervenor has acted at all times in good faith, based on detailed and accurate information provided to the District, in order to ensure compliance with the Zoning Regulations and in reasonable and costly reliance upon the repeated approvals granted by the District.

5. Intervenor, through its license architect and builder, made an honest and unintentional mistake regarding the number of "stories" in its original permit application. Immediately upon being made aware of this mistake, Intervenor consulted with DCRA, made minor revisions to the plans and received District authorization to continue construction. This revised building permit would have been issued originally if it had been requested.

6. This appeal must be judged solely on the objective and well-defined standards of the existing Zoning Regulations.

7. This project has been subjected to an unprecedented level of regulatory, political and community scrutiny and has been found by DCRA to be in compliance with each and every provision of the Zoning Regulations.

II. STATEMENT OF FACTS

In early 1999, Intervenor acquired the Property located in a R-1-A zone, which contained a two-story rambler,[2] constructed in 1956. The existing house contained a lower level partially out of grade in the front, a garage built into the lower level with access from a front driveway to 28th Street, and a main level which contained a living room, dining room, kitchen, three (3) bedrooms and two (2) bathrooms. Above the main level there was an attic or crawl space which did not contain any habitable rooms. See 1955 Constructions Drawings attached as Exhibit 1.

Intervenor hired an experienced and licensed District of Columbia architect, Neal Alan Duncan, to design the improvements to the existing house.

On April 26, 1999, Intervenor, through its architect and permit expediter, submitted a building permit application (Exhibit 2), including detailed architectural and construction drawings. Exhibit 3. The application form clearly sets forth the following:

Item 11. Type of Proposed Work: The "Addition" box is checked.

Item 12. Description of Proposed Work: "Demolish existing SFD [single-family dwelling] to foundation (Basement to Remain). Construct 3 Floors and Addition to Exist. Footprint. New 1 Story Garage."

Item 14. Ex. No. of Stories of Bldg.: "2".

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[2] Appellants incorrectly refer to the existing house as a "three-story single-family home." Appellants' Brief at p.7

Item 17. Prop. No. of Stories of Bldg.: "3".

Item 42. Total Lot Area: "7,494.25".

The application form does not stand alone, but is reviewed based on the detailed architectural and construction drawings which are the heart of any building permit application. A careful review of the drawings submitted and approved by DCRA show the following specific elements of this project:

- Remove the main floor and attic so that the existing lower level foundation and walls, first floor joists and first floor subfloor were retained. Exhibit 3.

- Construct a three-story addition above the existing foundation, lower level walls, and first level subfloor. Exhibit 3.

- Maintain the existing more than five (5) foot side-yard setbacks established by the east and west walls of the existing structure. A gas fireplace and vent was to be added to the west-side of the existing house. Exhibit 3.

- Construct an addition on the eastern side of the front house cantilevered out from the existing first floor joists on the front wall that is 23.5 feet long and 1.5 feet in depth and rising to the top of the second story. This addition is constructed within the 15 foot Building Restriction Line. Exhibit 3.

- Construct an open Balcony above the front porch. Exhibit 3.

- Construct a rear addition which maintains both the existing side-yards, including: a) 49.4' x 6.6' two-story addition which contains only crawl space below; and b) a one-story on grade frame addition to house a family room and breakfast area. Exhibit 3.

- Construct a new one-story detached garage at the rear of the site with access from the existing public alley. Exhibit 3.

Before issuance, this permit application was subjected to a standard review process spanning forty-three (43) days and approval by the full range of DCRA construction branches, including Zoning, Department of Public Works, Environmental Regulation Administration

(Erosion Control and Stormwater Management), Mechanical Engineering, Plumbing Engineering, Electrical Engineering, Structural Engineering and Quality Control. Exhibit 2, Page 4.

The following detailed chronology is critical to establishing the facts and legal rights of this case:

June 7, 1999: Building Permit No. B424294 ("Permit No. 1") issued to Intervenor authorizing it to "DEMOLISH EXIST SFD TO FOUNDATION. (BASMT TO REMAIN) CONSTRUCT 3 FLOORS AND ADDITION TO EXIST. FOOTPRINT. NEW 1 STORY GARAGE..." Exhibit 4.

June, 1999: Appellants meet with Intervenor to discuss project. Intervenor provided a copy of its plans. Appellants' Brief at Page 9.

July 1, 1999: Intervenor begins site preparation work. Appellant, Mr. Stuart Sloame, visits site to verify that trees on Intervenor's property, but providing shade to his adjoining house would not be disturbed.

July 12, 1999: Removal of roof and top story of existing house started.

July 27, 1999: Intervenor is informed by its permit expediter that a stop work order was issued. No record of any stop work order is ever produced.

July 27, 1999: Appellant, Mr. George Clark, visits site and expresses his architectural concerns, including suggestions to move the top story dormers to the rear and eliminate the second story open balcony.

July 28, 1999: In response to the reported stop work order, Intervenor meets with Mr. Toye Bellow, Zoning Technician to review side yard and height issues. Mr. Bellow advised Intervenor that no side yard issues exist and that a revision to finished grade will comply with the height requirements. Mr. Bellow advises Intervenor that it is permitted to continue construction at the site while the revised building permit application is submitted and approved by DCRA.

August 3, 1999: Footings poured for rear-yard addition.

August 3, 1999: Approved D.C. Construction Branch inspection of footing, addition and basement. Wall check requested. Exhibit 5.

August 11, 1999: Concrete block delivered for rear addition crawlspace.

August 12, 1999: Foundation for rear addition started.

August 16, 1999 Carpenters begin framing house.

August 19, 1999: Floor trusses for second floor delivered to site.

August 25, 1999: Floor trusses and joists for top story delivered to site.

August 25, 1999: Appellants' August 20 letter received by Intervenor (Mr. Murray Cohen) by hand-delivery to the site by Mr. Sloame. In this letter, Appellants allege violations of side-yard and height restrictions based on their review of plans voluntarily provided to them by Intervenor. Appellants state they have contacted DCRA and obtained a stop work order. Exhibit 6.

August 25, 1999: Appellants write to Mr. Edgar T. Nunley, Chief, Zoning Review Branch, acknowledging that work is continuing at the site and that a new stop work order should be issued. Exhibit 7. No Stop Work order is issued.

August 25, 1999: Intervenor submits revised Building Permit application based on advice of DCRA to "REVISE BUILDING PERMIT #B424294. CHANGE FINISHED GRADE TO CONVERT BASEMENT TO CELLAR." The permit application states that the building as proposed will have 3 stories. Exhibits 8 and 9. Appellants' focus on the application which was corrected from "3 ½" to "3" stories is irrelevant.

August 26, 1999: Second story walls installed.

September 1, 1999: Top story floor joists installed.

September 2, 1999: Roof plywood delivered to site.

September 2, 1999: Appellants write to Mr. Nunley following up an August 27, 1999 telephone conversation with him. Appellants acknowledge knowing that Intervenor has submitted a revised set of plans which would change the finished grade. Apparently, Mr. Clark had also talked to Mr. Toye Bellow, a Zoning Technician, who had also informed him of the proposal to modify the finished grade which would bring the project into compliance with the height limitation. Exhibit 10.

September 2, 1999: The Appellants write to Mr. Michael D. Johnson, the Zoning Administrator, seeking his assistance. Exhibit 11.

September 7, 1999: Framing of the first, second and part of the third story is completed. Exhibit 12.

September 8, 1999: Appellants write to Mr. Michael Johnson acknowledging that: a) they were informed the previous evening by Council member Kathy Patterson that DCRA had approved the revised plans; and b) received a voice mail that morning from Mr. Johnson that the project **"had no zoning issues and was approved."** Exhibit 13 (emphasis added).

September 8, 1999: Intervenor meets with Mr. Lourenco at D.C. Liaison Committee meeting at the National Association of Home Builder's headquarters. At that meeting, Mr. Lourenco indicated after a site inspection that the revised permit application to change finished grade was acceptable and the revised permit would be issued. Exhibit 14.

September 8, 1999: Council member Kathy Patterson writes to Mr. Lloyd J. Jordan, Director, DCRA, indicating that her staff had been informed by Mr. Armando Lourenco that based on a change in the finished grade, the height of the house was in compliance with the Zoning Regulations. A copy of this letter was provided to Mr. Clark. Exhibit 15.

September 10, 1999: Appellants write to Mr. Michael Johnson, the Zoning Administrator, acknowledging receipt of September 8 voice mail from Mr. Johnson stating that the **"department saw no violations and approved amended permits for this property."** Mr. Clark recognized his obligation to act in a timely manner by stating: **"we also need to have some evidence of a decision from the department so that we can file an appeal with the Board of Zoning Adjustment to overturn this arbitrary and capricious decision."** Mr. Clark also noted that Mr. Jordan told him the day before that "he has sent his best inspectors to the property this week and everything is fine." Exhibit 16 (emphasis added).

September 10, 1999: Mr. Armando Lourenco writes to Council member Kathy Patterson, after a September 7 site visit, to state the following: a) Intervenor revised plans regrading the finished grade to create a non-story "cellar" will be in compliance with the height restrictions; b) finished grade can not be finally determined until the end of construction, but will be monitored by DCRA; c) the distance above the sidewalk is irrelevant to the height determination; d) a wall check conducted by a licensed Surveyor determined that the side yards at the narrowest points are 5' ll" and 5' 2",

respectively; e) the existing house is not a non-conforming structure because the side yards which existed prior to 1958 were greater than 5' 0"; f) additions and alterations are permitted to the existing house provided the existing side yards are maintained; g) preservation of the existing foundation and walls up to the level of the first floor and therefore the side yards have been maintained. Exhibit 17.

Mr. Lourenco concludes by stating, "**considerations of appropriateness of the style of the project for the neighborhood are beyond our regulatory reach. I emphathize [sic] with the neighbors in this respect. This house will certainly be the most conspicuous structure to anyone walking along the block, but none of these considerations amount to a violation of the applicable regulations that would warrant any enforcement action on our part.**" Exhibit 17 (emphasis added).

September 13, 1999: Council member Kathy Patterson writes to Mr. Jordan, confirming a lengthy letter from Mr. Lourenco dated September 10, which found no zoning violation. A copy of this letter was provided to Mr. Clark. Exhibit 18.

September 14, 1999: Appellants write to Mr. Jordan acknowledging receipt of Mr. Lourenco's September 10 letter concluding that there was no violation of the Zoning Regulations. Mr. Clark also requests confirmation that DCRA has approved the revised building permit and on what date. Exhibit 19.

September 17,1999: Revised Building Permit No. B426784 ("Permit No. 2") issued to Intervenor to allow an approximately two (2) foot change in finished grade in compliance with the three-story height limitation. Exhibit 20.

September 20,1999: Mr. Lloyd Jordan writes to Council member Kathy Patterson stating that the "**regulations do allow property owners to regrade their lots as they see fit, including raising finished grade. This has been a practice allowed by the Zoning Administrator, for years.**" Exhibit 21 (emphasis added).

November 3, 1999: Appellants file BZA Appeal No. 16533 challenging Permit No. 1, dated June 7, 1999 and Permit No.2, dated September 17, 1999.

November 11, 1999: Intervenor retains counsel, Greenstein DeLorme & Luchs, P.C.

December 9, 1999: District issues Building Permit No. B423539 ("Permit No. 3") which authorizes installation of new and widened front steps, new walkway, and

minor addition to existing retaining wall in the front and a new retaining wall in the backyard to facilitate a new rear patio and stairs leading to the upper level of the site and parking pad from the public alley. Permit No. 3 does not affect any of the issues set forth by Appellants and is not part of this appeal. Exhibit 22.

III. LEGAL ARGUMENT

A. Appellants' Appeal is Untimely.

Section 3315.2 of the Zoning Regulations requires that an appeal to the Board must be timely filed. 11 DCMR §3315.2. However, as the Zoning Regulations do not set forth a specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely. Mendelson v. District of Columbia Board of Zoning Adjustment, 645 A.2d 1090, 1093 (D.C. 1994); Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 923 (D.C. 1980). Under this "reasonableness standard", the time for filing an appeal "commences when the party appealing is chargeable with notice or knowledge of the decision complained of." Id.; see also Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment, 490 A.2d 628, 636 (D.C. 1985).

The initial building permit (Permit No. 1) was issued on June 7, 1999. Work on the Property began no later than July 1, 1999, and demolition of the first story of the existing structure began on July 12, 1999. Appellants', aware of the activity at the property, requested and had a meeting with representatives of Intervenor in June 1999, at which time Intervenor provided Appellants with a copy of its plans and renderings of the addition to the property. Appellants' Brief at Pg. 9. At the time of the June 1999 meeting, Appellants formed the belief that the proposed house did not comply with the Zoning Regulations, as it was "too large for the

lot." Id. Subsequent to the June 1999 meeting, Appellants began their investigation into the proposed house and its compliance with the Zoning Regulations. Id. at 10.

In July 1999, in response to Appellants' complaints to the Zoning Administrator that the construction and plans violated the Zoning Regulations, a stop work order was apparently issued on July 27, 1999. However, after discussions with Intervenor regarding the proposed improvements to the existing house, the Zoning Administrator advised Intervenor that it could continue with construction, so long as Intervenor provided revised plans which complied with the Zoning Regulations. To achieve compliance with the Zoning Regulations, the Zoning Administrator advised Intervenor that it should complete a minor regrading to the front of the property so as to bring the improvements to the existing house into compliance. As a result of this advice from the Zoning Administrator, construction continued, virtually uninterrupted.

1. Appellants Were Charged With Notice of the Alleged Side Yard Requirement Violations in June 1999.

As demonstrated above, Appellants were aware of the proposed plans, the Zoning Administrator's approval of such plans and had, themselves, reviewed such plans, in June 1999. As Permit No. 2 did not effect the side yards, the time for the running of an appeal with regard to the alleged side-yard violations began to run as early as June 7, 1999, with the issuance of the Permit No. 1, or, at the latest, at the time of the meeting with Intervenor in late June 1999. The filing of the appeal with regard to the side-yard requirements almost four months after Appellants' actual knowledge of the actions of the Zoning Administrator in issuing Permit No. 1, is clearly untimely.

2. **Appellants Were Charged With Notice of the Alleged Zoning Regulation Violations Regarding the Height and Number of Stories of the Improvements to the House as Early as June 1999, or, at the Latest, in Early September 1999.**

Although Appellants argue that they withheld filing an appeal until they received "some evidence of a decision from the department," regarding the Zoning Administrator's decision that the building permits were validly authorized and that the proposed improvements to the house where not in violation of the Zoning Regulations (see Appellants' Exhibit 12), this argument fails for several reasons.

First, Appellants were charged with knowledge of any alleged violations at the time of the issuance of the building permits on June 7, 1999, and September 17, 1999. The issuance of an allegedly illegal building permit is a "decision" which is appealable to the BZA pursuant to 11 DCMR §3100.3.

Second, at the time of the commencement of construction, Appellants were put on notice of the alleged violations and, in fact, Appellants requested and held a meeting with Intervenor. Additionally, almost three months prior to the filing of their appeal, Appellants initiated communications with the Zoning Administrator regarding the allegedly illegal construction.

Third, assuming the posting of the building permits and commencement of construction[3] at the property did not "charge" Appellants with notice or knowledge of the alleged violations, as of September 7, 1999, it is undisputed that Appellants were aware of the Zoning Administrator's decision that the construction was approved and not illegal. See Appellants' Brief at p. 13;

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[3] The Appellants have closely monitored the site, including routine visits without authorization to tour the construction site and interior of the existing house. During these visits, Appellants have taken measurements. Appellants' Exhibit 23.

Intervenor's Exhibit 15. As set forth in Appellants' brief, on September 8, 1999, they received a telephone call from Mr. Michael Johnson, the Zoning Administrator, during which Mr. Johnson stated that it was the Zoning Department's position that the proposed building contained "no violations" of the zoning code and that the amended permit for the property had been approved. See Appellants' Exhibit 12; Intervenor's Exhibit 16. A verbal decision, such as the one issued by the Zoning Administrator on September 8, 1999, is an appealable order which begins the running of the time for appeal. Goto, 423 A.2d at 924; see also Beins v. District of Columbia Board of Zoning Adjustment, 572 A.2d 122, 127 n.5 (D.C. 1990).

As further evidence of Appellants' knowledge of the position of the Zoning Administrator that the proposed house did not violate the Zoning Regulations is Appellants' August 25, 1999 correspondence to the Chief of Zoning Review Branch, in which Appellants' complained that the stop work order issued on July 27, 1999, should not have been lifted before "new and conforming plans were approved." Appellants' Exhibit 7; Intervenors' Exhibit 7.

It is abundantly clear from Appellants' correspondence with the District during July, August and early September, 1999, that Appellants were aware of the Zoning Administrator's decision that the improvements to the house were in compliance with the Zoning Regulations. Consequently, at the very latest, Appellants were put on notice of the Zoning Administrator's decision in late July or August or early September, 1999, triggering the time in which to file their appeal. If (although it is highly improbable), Appellants had any question as to the Zoning Administrator's position on the legality of the building permits and/or compliance of the improvements to the house with the Zoning Regulations, Lloyd J. Jordan's, Director, DCRA,

correspondence of September 20, 1999, resolved any outstanding issues. See Appellants' Exhibit 17. Specifically, Mr. Jordan states that:

> a. The [zoning] regulations do allow property owners to regrade their lots as they see fit, including raising the finished grade. **This has been a practice allowed by the Zoning Administrator for years.**
>
> b. The Zoning Regulations do not restrict the way in which berming at the front of a residence is accomplished . . .
>
> c. In the particular case of third-party wall checks by D.C. registered professional land surveyors, more than ten years of experience have proven to be very successful, therefore **we see no reason to believe that this particular survey (copy attached) is flawed**.

Appellants' Exhibit 17; Intervenor's Exhibit 19.

3. **Appellants' Allegations That They Did Not Receive All Documents Needed To File Their Appeal Until October 1999, Is Unsubstantiated and Irrelevant To the Issue of the Untimely Filing of Their Appeal.**

Appellants claim that they did not receive "copies of all the relevant papers" needed to file their brief until October 1999, and that, as a consequence, their November 3, 1999 filing was timely. Appellants' Brief at Page 16. However, Appellants fail to substantiate this claim. Significantly, Appellants, in a lengthy brief, fail to identify what these "relevant" documents were and why the absence of these documents, in light of their actual and repeated knowledge of the Zoning Administrator's decision, precluded them from timely filing their appeal.

More important, however, is the standard by which the timeliness of filing an appeal is judged: that is, when a party is "put on notice", not when the party subjectively deems it has all relevant documents regarding the action taken. Appellants were clearly put on notice and any

documents they may have sought were almost immediately available from DCRA through the Records Management Branch.

In the instant case, as illustrated above, several events put Appellants on notice of the Zoning Administrator's decision, including:

a. The issuance of the first building permit (June 7, 1999);

b. Meeting and receipt of plans from Intervenor (June 1999);

c. Commencement of construction (July 1, 1999);

d. Continued construction with the Zoning Administrator's approval after the issuance of the stop-work order (July 28, 1999);

e. Continued construction after Appellants requested a second stop work order (August 25, 1999); and

f. The Zoning Administrator's verbal decision communicated to Appellants on September 7, 1999.

Once Appellants' were put on knowledge of the alleged violations and the District's decision regarding the alleged violations, had they acted with reasonable diligence, they should have filed their appeal with regard to both the alleged violations of the side yard requirements, as well as the alleged violations of the height and number of stories of the improvements to the existing house, before construction was under way. At the very latest, Appellants had all the necessary information to file their appeal as early as September 7, 1999. Appellants' threats of action followed by prolonged inaction are no substitute for timely filing of an appeal, particularly in light of the District's repeated and unequivocal approvals of this project.

In light of the foregoing, Appellants' did not timely file their appeal with the BZA, as they waited over two (2) months from the notification of the District's decision evidenced in

Permit No. 2 and over four (4) months after being put on notice of the alleged violations. Consequently, the BZA lacks jurisdiction to hear this appeal and must dismiss the case.

B. Appellants' Are Barred By the Doctrine of Laches.

Laches is "a species of estoppel,"[4] being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." Weick, 383 A.2d at 11. The two (2) elements of laches are the unreasonableness of the delay and the resulting prejudice to the party asserting the defense. See e.g. American University Park Citizens Association v. Burka, (D.C. 1979) 400 A.2d 737, 741

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[4] The elements of estoppel are: (1) expensive and permanent improvements; (2) made in good faith; (3) in justifiable and reasonable reliance upon; (4) affirmative acts of the District government; (5) without notice that the improvements might violate the zoning regulations; and (6) equities that strongly favor the party asserting the defense. Weick v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7, 11 (D.C. 1978); Rafferty v. District of Columbia Zoning Commission, 662 A.2d 191, 194 (1995). It is not clear whether estoppel can bar an appeal brought by a neighboring landowner, as is the case in the instant matter. See Goto, 423 A.2d at 925 n.15. If estoppel were applicable in this case, Intervenor has met all the necessary requirements for this defense in that it has made expensive and permanent improvements to the Property in good faith reliance on the acts and representations of the Zoning Administrator in issuing it the building permit, as well as the Zoning Administrator's repeated and numerous decisions that the construction and proposed plans were legal. Additionally, Intervenor acted in good-faith in relying on the Zoning Administrator's representations, including representations that the Zoning Regulations permitted regrading so that the basement would be converted to a cellar within the definitions of the Zoning Regulations. As a result of the extensive governmental review of the property, proposed construction and building permits, Intervenor was justified in its belief that its actions with regard to the property did not violate the Zoning Regulations. Appellants' extensive delay in filing their appeal, the level of scrutiny Intervenors plans and construction received from the District government, and the extent of the improvements to the property, equities favor the defense of estoppel.

Although the estoppel defense may not be available against the Appellants, clearly, the defense would be available against the Zoning Administrator. Goto, 423 A.2d at 925 n.15 (add cites). The Court of Appeals of the District of Columbia has questioned, in cases such as this, whether the BZA could compel Appellant to observe zoning requirements that the Zoning Administrator is estopped to enforce. Id.

(D.C. 1979). The "entire course of events," not merely the period from the zoning official's decision to the filing of an appeal, is relevant when determining the validity of a laches defense. Goto 423 A.2d at 925, n.16.

As illustrated above in Section III.A., Appellants were charged with notice of the alleged violations set forth in their appeal as early as June 7, 1999, or, at the latest, September 7, 1999. Despite this knowledge, Appellants unreasonably and inexcusably delayed the filing of their appeal until November 3, 1999, at which time Intervenor had already expended large sums of money, time and labor in improving the property.

1. Unreasonableness of Appellants' Delay in Filing Their Appeal.

Implicit in the requirement that a party not unreasonably delay the filing of their appeal is the duty of an injured party to act diligently in investigating their complaints. See Goto, 423 A.2d at 926. In the instant matter, Appellants did not act diligently in their investigation leading up to the filing of their appeal. Appellants offer no explanation for their unexcused delay in filing their appeal.

That Appellants were aware that the timely filing of an appeal was necessary is apparent from their own correspondence, as outlined below:

a. Letter dated August 25, 1999, to Edgar T. Nunley, Chief of zoning Review Branch. Appellants state "We believe that the situation is reaching a critical stage." Exhibit 7.

b. Letter dated September 2, 1999, to Mr. Nunley. Appellants acknowledge that "the issues at this property have been pending for some time." Appellants go on to cite the amount of construction which has taken place at the site.[5] Exhibit 10.

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[5] Appellants, on numerous occasions, make the outlandish accusation that Intervenor "raced" along with the construction and that Intervenor's work habits illustrate "guilty

c. Letter dated September 2, 1999, to Mr. Michael Johnson, Zoning Administrator. Appellants acknowledge that construction is continuing. Exhibit 11.

d. Letter dated September 8, 1999, to Mr. Johnson. Appellants point out that the three stories added to the foundation have been framed. Exhibit 13.

e. Letter dated September 8, 1999, to Mr. Lloyd J. Jordan, Director, DCRA, from Council member Kathy Patterson on behalf of Applicants. Ms. Patterson states that "Time is of the essence." Exhibit 15.

f. Letter dated September 10, 1999, to Mr. Johnson. Appellants acknowledge that they have received (via a voice mail message from the Zoning Administrator) the Zoning Administrator's decision regarding the property and the alleged violations but erroneously claim they need "some evidence" of the Zoning Administrator's decision in order to file an appeal. Exhibit 16.

See also Appellants' Exhibits 7 through 12, respectively.

Appellants were not only aware of the Zoning Administrator's decision regarding the alleged violations complained of in their appeal well in advance of the filing of the appeal, Appellants were aware that the time was of the essence, as construction at the property was underway. Moreover, throughout June, July and August 1999, and into early September 1999, the District made clear its decisions that the construction was not in violation of the Zoning

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knowledge of wrongdoing". However, what Appellants fail to recognize is that Intervenor, justifiably relying on the Zoning Administrator's issuance of the building permits, advice to continue with construction and that minor regrading was permitted in order to bring the improvements to the existing house into compliance with the Zoning Regulations, proceeded with the construction in accordance with its timetable for the construction, which included the contracting for materials and subcontractors at specified points in the construction process. The evidence will refute any allegation that Intervenor "raced" to complete the construction. Furthermore, Intervenor has acknowledged that it made an error in its original building permit in it belief that the basement of the existing structure did not constitute a "story". This error was unintentional and was not made with the purpose of attempting to circumvent the Zoning Regulations.

Regulations.[6] Despite their knowledge of the alleged violations and the District's unequivocal opinion, Appellants failed to take any action other than to inundate DCRA and the Zoning Administrator with correspondence and attempts to enlist their Council member's assistance in swaying the District's decisions. The appropriate action would have been to file their appeal to preserve their rights, provide fair and timely notice to Intervenor, as well as to ensure prompt and proper enforcement of the Zoning Regulations.

Curiously, despite having acknowledged receiving the District's decision that the construction was legal in August and September 1999, Appellants' allege that they did not receive "copies of all the relevant papers until October [1999]". However, their inability or unwillingness to obtain these unidentified documents does not constitute just cause in delaying the filing of their appeal. All documents regarding the building permits and the applications therefore were public record, which Appellants could have reviewed and obtained simply by making a trip to DCRA. This argument is even more disingenuous in light of the fact that Intervenor voluntarily submitted many of these documents to Appellants for their review as early as June, 1999. Appellants' failure to timely investigate their claims and reliance on the District in sending them copies of these documents (assuming this is the avenue they elected to take) cannot be countenanced by the BZA.

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[6] Even with the discovery of the mistake that the original plans showed four (4) stories, as the basement was more than four (4) feet above grade, it is clear that the District's position, evidenced as early as August 1999, is that minor regrading to the Property, so as to leave less than four (4) feet exposed, would correct this error and bring the construction into compliance with the Zoning Regulations.

Appellants' delay in filing is unexplained. In light of the foregoing facts, as well as Appellant Clark's position as an experienced and nationally-known litigator with more than twenty-seven (27) years experience, professionally knowledgeable of the importance of timely filing requirements and standards of reasonableness, the delay in filing is unreasonable.

2. **Allowing Appellants to Proceed With Their Appeal After Appellants' Inexcusable and Unreasonable Delay in the Filing of the Appeal Would Result in Prejudice to Intervenor.**

The Court of Appeals for the District of Columbia has recognized that "the principal element in applying the doctrine of laches is the resulting prejudice to the defendant, rather than the delay itself." Goto, 423 A.2d at 925. Fairness, however, will bar the application of the doctrine of laches where the result would be unjust. Beins v. District of Columbia Board of Zoning Adjustment, 572 A.2d 122, 126 (D.C. 1990).

In this case, Intervenor proceeded with its construction of the additions to the existing house upon justified reliance on the District's issuance of building permits and decisions that the construction did not violate the Zoning Regulations. Meanwhile, Appellants "stood by and watched [Intervenor] spend time and money [for] months before pressing their objections with the BZA." See Goto, 423 A.2d at 926. Intervenor is prejudiced by the subject appeal, not only by its expenditures to date, but also by the fact that, as a result of Appellants' delay, construction has proceeded beyond a point where changes can be made to the improvements which would satisfy Appellants subjective concerns without demolishing much of the new construction.[7]

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[7] Should the BZA decide that the Zoning Administrator's long standing position that a property owner may regrade his property is no longer to be enforced, such a decision should not be applied retroactively, as Intervenor would be prejudiced by such a ruling. See French v. District of Columbia Board of Zoning Adjustment, 658 A.2d 1023, 1031-1032 (1995).

C. **Intervenor Acted In A Good Faith, Accurate, Honest And Timely Manner To Fully Comply With The Zoning Regulations.**

As a diversionary tactic and perhaps motivated by frustration, Appellants have unsuccessfully attempted to portray Intervenor's actions as fraudulent, misleading and otherwise not entitled to the protections afforded by fundamental fairness, the law and the Zoning Regulations. Without offering any evidence, Appellants challenge Intervenor's motives and conduct. However, on the facts, it can not be disputed that Intervenor acted responsibly and ensured that this project complied with every aspect of the Zoning Regulations.

The original permit application and constructions drawings were prepared by a licensed and experienced architect, Neal Allan Duncan, who diligently sought to ensure compliance with the Zoning Regulations and other applicable codes. Upon careful and knowledgeable review, the application and construction plans painstakingly set forth each and every element of the proposed project without any attempt to mislead, misrepresent or not disclose. The architect's complete candor in his work is self-evident from the plans which in retrospect clearly show a structure which includes a non-"cellar" story and three additional stories.

Hindsight being 20-20, the architect honestly now admits that he mistakenly failed to take into consideration that the existing lower-level of the house would count for purposes of the applicable three-story limitation. At the same time, the proposed project complied with the forty-foot height limit also imposed. Despite suggestions to the contrary by Appellants, the architect's actions were not in pursuit of illegal advantage or gain, but simply a human error. Given the ease and minor nature with which compliance was subsequently achieved and the extraordinary financial and other costs which resulted from this mistake, it defies logic that this

was a deliberate act. No advantage, economic or otherwise, was sought or achieved through this mistake.

Having acted diligently and responsibly in the preparation and processing of the building permit application, Intervenor was fully entitled to rely on the approvals from the District obtained by Permit No. 1. Immediately upon receiving unofficial notice of a stop work order, Intervenor voluntarily ceased work and contacted DCRA to determine the nature of the problem that had arisen, accepted the guidance provided, took the required steps to correct the deficiency and achieve compliance with the Zoning Regulations, and obtained authorization to proceed with the ongoing construction. As a practical matter, had Intervenor submitted the revised Permit No. 2 originally, that application would have been approved in the same manner that actually occurred and would not have been subjected to further or different review by DCRA.

Appellants repeatedly complain that Intervenor's permit applications requested authorization to do one thing and then proceeded to construct an entirely undisclosed, different or additional (and illegal) set of improvements. Nothing can be further from the truth. Intervenor in its building permit applications clearly, and in detail, disclosed every element of the project and then proceeded to complete those same approved improvements, including:

- Remove the main floor and attic so that the existing lower level foundation and walls, first floor joists and first floor subfloor were retained. Exhibit 3.
- Construct a three-story addition above the existing foundation, lower level walls, and first level subfloor. Exhibits 3.
- Maintain the existing more than five (5) foot side-yard setbacks established by the east and west walls of the existing structure. A gas fireplace and vent was to be added to the west-side of the existing house. Exhibit 3.

- Construct an addition on the eastern side of the front house cantilevered out from the existing first floor joists on the front wall that is 23.5 feet long and 1.5 feet in depth and rising to the top of the second story. This addition is constructed within the 15 foot Building Restriction Line. Exhibit 3.

- Construct an open Balcony above the front porch. Exhibit 3.

- Construct a rear addition which maintains both the existing side-yards, including: a) 49.4' x 6.6' two-story addition which contains only crawl space below; and b) a one-story on grade frame addition to house a family room and breakfast area. Exhibit 3.

- Construct a new one-story detached garage at the rear of the site with access from the existing public alley. Exhibit 3.

It is beyond dispute, that the very things Appellants complain that Intervenor constructed without authorization are the very same things that were specifically requested and approved by the District.

D. <u>Appellants' Subjective Complaints Are Irrelevant To This Appeal</u>.

There is no dispute that Appellants do not like this house and view it as an intrusion into their neighborhood. Additionally, Appellants, supported by Advisory Neighborhood Commission 3F, honestly and fervently believe that the current Zoning Regulations which were enacted in 1958, are no longer appropriate and advocate there unilateral and post hoc amendment by the Board. In support, Appellants cite the threat of "tear down" houses, mansionization and a host of worst-case hypotheticals which are improbable, if not silly, and have no bearing on the specific facts of this case.[8]

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[8] Appellants reliance on sensational hypotheticals (e.g. 7 or 10 story house, 7 story berms, etc.) unsuccessfully attempt to divert attention from the specific details of this project.

More importantly, the Board's jurisdiction and responsibility in this case is narrow. Amendment of the Zoning Regulations is the exclusive jurisdiction of the Zoning Commission. Both DCRA, in issuing the building permits, and the Board in reviewing the Zoning Administrator's decisions, share the same responsibility- enforcement of the Zoning Regulations in an fair and objective manner. There is no room for emotional, subjective or personal criteria.

This project has been subjected to unprecedented and longstanding regulatory, political and community scrutiny. At every stage of this exhaustive oversight process which defies any allegations of "cover-up", compliance with the current Zoning Regulations has been the one and only relevant and operative criteria. At every level of the DCRA hierarchy, this project has been reviewed, inspected, subjected to outside scrutiny and reviewed again. Specifically, this has been a bottom up review by DCRA. Mr. Toye Bellow, the Zoning Technician, has been involved in every stage and closely supervised by his superiors, Mr. Edgar T. Nunley, Chief, Zoning Review Branch; Mr. Michael D. Johnson, the Zoning Administrator; Mr. Armando Lourenco, the Administrator of the Building and Land Regulation Administration; and Mr. Lloyd Jordan, the Director of the Department of Consumer and Regulatory Affairs. Great care was taken by the entire DCRA hierarchy, including unusual site inspections by at least Messrs. Lourenco and Johnson. At every stage of this exhaustive process, DCRA has been steadfast in its regulatory responsibility, often faced with extreme political and community pressure. To its credit, DCRA acted professionally and in a fair and even-handed manner despite what is clearly an unpopular decision.

Intervenor is proud of this house. It is an attractive and first-class rehabilitation of an existing house. The finished product will be in keeping with the upscale character of the neighborhood and provide an exceptional home for a family moving into the area.

IV. ZONING COMPLIANCE

A. This Project Is An Addition, Not A Total Demolition And New Construction.

Under the Building Code, an "Addition" is defined as "[a]n extension or increase in the floor area or height of a building or structure." 12 DCMR 201.1 (1986). As clearly set forth in the building permit application and actual construction, Intervenor maintained the existing foundation, lower-level and walls, first floor joists, and subfloor of the main floor and added or extended the height of the building, as well as the other improvements. DCRA correctly recognized that a substantial portion of the existing house was preserved as an integral basis of the improvements which were made.

B. This Project Complies With The Applicable Side-Yard Restrictions.

The Property is zoned R-1-A and was built in 1956, prior to enactment of the current Zoning Regulations. The applicable side-yard restrictions are clear:

> In the case of a building existing on or before May 12, 1958, with a side yard less than eight feet (8 ft.) wide , an extension or addition may be made to the building; **Provided, that the width of the existing side yard shall not be decreased;** and Provided further, that the width of the existing side yard shall be a minimum of five feet (5 ft.).

11 DCMR 405.8 (emphasis added).

"Side yard" is defined as a "yard between any portion of a building or other structure and the adjacent side lot line, extending for the full depth of the building or structure." 11 DCMR 199.1.

Applying these standards, it is clear that Intervenor has complied with the side-yard restrictions for the following reasons:

1. The existing house was constructed in 1956.

2. The existing house had a side yard of less than eight feet, but more than five feet on each side. A 1998 house location survey, second independent survey and wall check test all prepared by licensed professional surveyors confirm the existing conditions. Exhibits 23, 24, and 25.

3. The additions to the property do not decrease the existing side-yards, as confirmed by an independent survey and separate wall check test. Visually, this can be demonstrated by a parallel line running along each side boundary line for a depth that is equal to or greater than the side-yard measurements for the existing house. Exhibit 24 and 25.

4. The minor addition to the front (1.5 foot cantilevered) and the more extensive addition to the rear of the property do not decrease the existing side-yards and, in fact, exceed the existing 5 feet plus side-yards. Exhibit 3.

5. The "direct vent gas log fireplace" constructed in the west side-yard was clearly shown on the approved construction plans and does not decrease or encroach on the existing side yard. Even if the fireplace extended beyond the existing side-yard (which it does not) it would be a permitted side-yard projection. 11 DCMR 2502.8, provides that a chimney, smoke stack or flue may project in any require side yard for a distance not to exceed 2 feet. As set forth by Appellants, the fireplace is 2 feet deep and would be permitted in its entirety. Exhibits 3 and 26.

C. <u>The Project Complies With the Three-Story And Forty Foot Height Restrictions</u>.

In the R-1-A zone in which this property is located, building height is subject to a dual standard: a) Forty (40) feet; and b) Three (3) stories. 11 DCMR 400.1.

For purposes of both measurements, the measuring point is defined as the "**<u>finished grade level at the middle of the front of the building to the ceiling of the top story.</u>**" 11 DCMR 199.1 (emphasis added). As clearly established by DCRA, "finished grade" can be changed by the builder. In drafting the Zoning Regulations, the word "finished" was specifically

used rather than "existing," "natural" or other adjectives to desirable "grade." In this case, the measuring point is the front door of the existing house.

"Story" is defined as the "the space between two (2) successive floors in a building or between the top floor and the ceiling or underside of the roof framing ... For purposes of determining the maximum number of permitted stories, **the term 'story' shall not include cellars,** stair or elevator penthouse or other roof structures; ... 11 DCMR 199.1 (emphasis added).

"Cellar" is defined as "that portion of a story , the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade. 11 DCMR 199.1 (emphasis added).

Based on these clearly defined standards, the height of the building is:

1. **33.5 feet** as measured from the finished grade at the center of the front to the ceiling of the top story. Exhibit 9.

2. **Three (3) stories**.[9] The ceiling of the lower level is three (3) feet, six (6) inches above the finished grade. Exhibit 26. As shown on the Exhibit 9, the top of the first floor is 3'-10" inches above the finished grade. Appellants photographic evidence (Appellants' Exhibit 23) clearly demonstrates that the lower level is a "cellar" because the tape measure used by Appellants shows less than forty-eight (48) inches to the top of the ceiling of the lower level which is located below the horizontal coarse of stone shown in the picture. Exhibit 26.

3. The lower level is a "cellar" and does not count as a story based on the approved plan and the architect's field measurement.

4. The finished grade is level across the front of the building for a distance of approximately fifty (50) feet running from the western property line to the east of the center of the front of the house. Because this project is not a total demolition as set forth in the building Code, 12 DCMR 105.3, "restoration of established grades" is not required, contrary to the Zoning Regulations and unenforceable by the Board.

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[9] Appellants also seek to rely on Intervenor's marketing (e.g. four levels, four finished floors, six bedrooms) to establish a violation of the Zoning Regulations. Imprecise marketing terms cannot substitute for the specific definitions set forth in the Zoning Regulations. Here, a "four level" house has only three stories.

D. The Lot Complies With The Minimum Lot Area Requirement.

In the R-1-A zone, a lot must have an area of 7,500 square feet. 11 DCMR 401.1. This property has a lot area of 7,494.25 square feet. However, addition to the "non-conforming structure"[10] is clearly permitted as a matter-of right, subject to compliance with the following conditions:

a. The structure shall conform to the percentage of lot occupancy requirements; and

b. the addition or enlargement itself shall conform to use and structure requirements; and

c. The addition or enlargement itself shall not increase or extend any existing non-conforming aspect of the structure, and shall not create any new nonconformity of structure and addition combine.

11 DCMR 2001.3.

In this case, each of the conditions are satisfied:

1. The maximum lot occupancy permitted is forty percent (40%) of 7,494.25 square feet or 2,997.7 square feet. The lot occupancy provided is 2,742.92 square feet or 36.6 percent, including the detached garage which was approved, but has not been built.

2. The additions and enlargements provided comply with the use (single-family dwelling) and structure requirements, including side-yard, rear yard, lot width and height requirements.[11]

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[10] "Non-conforming structure" is defined as a structure, lawfully existing at the time this title or any amendment to this title become effective, which does not conform to all provisions of this title or the amendment, other than use, parking, loading, and roof structure requirements. Regulatory standards that create nonconformity of structures include, but are not limited to, height of building, lot area, width of lot, floor area ratio, lot occupancy, yard court, and residential recreation space requirements. (Emphasis added.)

[11] Despite Appellants assertion, there is no violation of the fifteen foot Building Restriction Line from the front porch or open balcony (with the same footprint). Exhibit 26.

3. The addition or enlargement does not increase any non-conformity. In this case, lot area is the only non-conformity. There is no side-yard non-conformity based on the provisions of 11 DCMR 405.8 which establishes a specific side yard requirement for this property other than eight feet. As set forth, Intervenor has complied with the aplicable provisions of 11 DCMR 405.8.

Although, it is not necessary to establish lot area compliance in this case, 11 DCMR 407.1 provides:

> The Zoning Administrator is authorized to permit a deviation not to exceed two percent (2%) of the area requirements of sections 401 and 403 of this chapter; a deviation not to exceed ten percent (10%) of the linear requirements of sections 404 and 405 of this chapter; and a deviation of the requirements of section 406 of this chapter, not to exceed **either** two percent (2%) of the area standard **or** ten percent (10%) of the width standard; Provided that:
>
> (a) A building shall be allowed to deviate from the requirements of no more than two (2) of the sections identified in this subsection; and
>
> (b) The deviation or deviations shall be deemed by the Zoning Administrator not to impair the purpose of the otherwise applicable regulations.

11 DCMR 407 (emphasis in original).

Under this provision, the Zoning Administrator is authorized to make minor deviations in the zoning requirements for lot area (Section 401) of not more than two percent or 150 square feet. In this case, the lot area deviation is only 5.75 square feet or .00076 percent and would be within the permitted authority of the Zoning Administrator. In making this determination, there is no requirement that the Zoning Administrator to consult 11 DCMR 223,[12] which is applicable only on the Board in circumstances which do not exist or apply in this case.

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[12] 11 DCMR 223 does not apply because this matter is not before the Board as a special exception application.

CONCLUSION

1. The Appeal is untimely and must be dismissed for lack of Board jurisdiction .

2. The Appeal is barred by the doctrine of laches and must be dismissed.

3. Appellants have the burden of proof in this Appeal. 11 DCMR 3119.2. Appellants[13] have not established a violation of the Zoning Regulations and the appeal must be denied.

Respectfully submitted,

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[13] ANC 3F is entitled to "great weight" from the Board. However, in this case the Board's determination that Intervenor complied with the Zoning Regulations is the only consideration required.